Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 1, 21 and 74	)	MM Docket No. 97-217
To Enable Multipoint Distribution	)	
Service and Instructional	)	File No. RM-9060
Television Fixed Service Licensees	)	
To Engage in Fixed Two-Way Transmission	)	

To: The Commission

COMMENTS OF THE ALLIANCE OF MDS LICENSEES

ALLIANCE OF MDS LICENSEES

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Summary

The Alliance of MDS Licensees is a group of long-standing licensees in the MDS field. These Comments support in large part the initiative of the proponents of new and expanded two-way capability in the MDS service. However, MDS LICENSEES also raise important reservations about the effects of some of the proposed changes in the rules.

Briefly, MDS LICENSEES believe that the best and, in a practical sense, the only way that effective two-way service can be achieved is through adoption of regional master plans among and between the various licensees in the various services affected. Once a master plan is adopted by all participating members in a defined region, Commission oversight and paperwork could be very substantially reduced or eliminated, along the lines of the cellular radio model. The rights of all licensees not to participate in such plans and the rights of adjacent and co-channel operators to interference protection would be preserved and protected.

With this general principal, a number of key corollaries follow. Channel 1 and 2/2A licensees who are presumptively using their channels for some purpose now, should not be dispossessed of them to serve the needs of other licensees. Only licensees should be permitted to apply for and receive authorizations on their

channels in their PSAs or BTAs. The rules should reflect the flexible uses of frequencies contemplated by two-way operation by recognizing that there may be periods of non-use of particular frequencies within a master plan by protecting receive sites as well as transmit sites, by ensuring that antenna sites are reasonably available and by assuring that master plans comply with licensee control requirements.

In addition, MDS LICENSEES are concerned that the application filing plan contemplated by the Commission will swamp the capabilities of both the industry and the Commission to handle. Procedures should be established which do not create a gold rush mentality, with attendant clumps of applications. The Commission should retain its statutory position as the arbiter of disputes regarding interference and other issues. In the absence of a master plan, there should be no automatic grants or, if there are, they should be conditioned upon no interference being caused and operation of the offending facility ceasing as soon as notice of interference is given by an affected licensee.

Finally, existing lease agreements should not be used to authorize activities or applications by MDS and ITFS lessees which were not contemplated by the parties when the leases were executed.

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These Comments of the Alliance of MDS Licensees ("MDS LICENSEES") are submitted in response to the Commission's October 10, 1997 Notice of Proposed Rulemaking regarding two-way transmissions in the MDS/ITFS bands. MDS LICENSEES are an association of some 19 licensees in the MDS service who are deeply interested in the course this proceeding takes since it could so dramatically affect their rights and their planned usage of the channels at issue.[1]/ Most of the MDS LICENSEES are long time participants in the MDS industry, in some cases dating back to the pre-multichannel era. The major proponents of the two-way proposal now on the table (the "Two-way Proponents") share the desire of MDS LICENSEES to maximize the potential usage and potential public benefits of the MDS channels. However, in many important respects the proponents' proposals may operate in derogation of the rights,

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[1]/ A list of the participants in MDS Licensees is attached as Appendix A. Some of these participants are also filing their own separate comments.

prerogatives and, indeed, responsibilities of existing MDS LICENSEES. It is for this reason that MDS LICENSEES have come together to present their unique perspective on the matters under consideration.

I. The Proposal In General Has Merit

At the outset, MDS LICENSEES applaud the initiative to make usage of the MDS and ITFS channels more flexible, thus opening up new opportunities for two-way applications and other non-video based usages of this band. While MDS LICENSEES continue to believe that the MMDS/ITFS spectrum has potential as an alternative to cabled video service, there are many cases where such usage is neither the best nor the most economically feasible usage of the channels. In those cases, MDS LICENSEES are fully supportive of having the regulatory flexibility to adapt their transmissions to the needs of their particular markets. We therefore agree with the proposition that two-way operations should be permitted in the normal course, that regulatory delays related to such operations should be minimized or eliminated, and that present interference standards should be maintained. As always, however, the devil is in the details.

Before addressing specific issues raised by the NPRM (and by the subsequent proposal advanced by Catholic Television Network), it may be useful to identify the basic principles from

which our concerns flow.

1. Part of the problem with the current usage of the MMDS/ITFS band is the balkanization of the licensing scheme. For historical reasons unique to the MDS field, the band developed first with Channels 1 and 2/2A at 2150-2162 MHz. Then two four-channel MMDS groups were carved out of the under-used ITFS spectrum, and the ITFS rules were liberalized to make possible commercial uses of excess ITFS capacity. Then three H group channels were thrown into the mix. The intent was a worthy one - to make sufficient channels available for wireless cable operations to be competitive with traditional wired cable systems. The result was that the theoretically available 33 channels are an amalgam of frequencies, licensees and differing regulations. Then BTA winners entered the picture with rights to all of the otherwise unassigned MDS channels in their markets. While the Commission has moved toward making the rules for the various segments of the 33 channel group more consistent from a technical and interference standpoint, we still must deal with the historical fact that the 33 channels are usually authorized to different licensees who have differing priorities and goals for their systems. The two-way proposal largely ignores this very fundamental difficulty with the licensing scheme it envisions.

2. In principle, MDS LICENSEES heartily endorse the Two-way Proponents' concept of rendering the MDS and ITFS channels more

accessible to two-way usage. Such capability significantly expands the possibilities which were always inherent in this spectrum but which have never been fully exploited. With the explosive growth of demand for high speed internet and other data uses, a demand which this service is ideally suited to meet, the time is ripe for this development. However, as noted below, this expansion of possibilities should not be accomplished at the expense of chaos among licensees as they attempt to intensify their usage of the spectrum in extremely close quarters. It should also not be accomplished by awarding **users** of the spectrum the right to control the spectrum to the derogation of the rights of the licensees. The proposed rules need to be modified or clarified to preclude this presumably unintended result. In addition, a number of the Commission's bedrock licensing touchstones are predicated on the existence of at least one central transmitting site. Since the proposed rules contemplate highly flexible usage -- and even non-usage -- of particular channels in order to accommodate wide area, cross spectrum two-way operation, the application of current usage requirements in this environment must be clarified.

3. To the extent that "refarming" of the frequencies may be useful to accomplish the purposes of the Two-way Proponents, this reshuffling should only be effected among existing MDS and ITFS licensees and only with their consent. Any other approach would strip long term licensees who have presumptively been using their frequencies in the public interest (often for many, many

years) of the benefit of their efforts to build and develop the possibilities of this service over the last couple of decades. It should also be stressed that there are many legitimate and worthy uses of MDS and ITFS which do not involve two-way operation. No one who is pursuing those other uses (including traditional analog video) should be dispossessed of its frequencies just because someone else suddenly wants to use different frequencies for two-way purposes.

4. The procedures adopted to implement two-way operations should be streamlined to permit rapid response to customer demand but should not impose unrealistic burdens on the Commission, existing licensees, and the engineering community to prepare or review extraordinarily complex interference studies in highly abbreviated time frames. It seems to MDS LICENSEES that if the two-way plan is likely to work at all, it must work in an environment where all potentially affected licensees have signed off on a master plan and a single master plan has been agreed to voluntarily by participating licensees. Under those conditions (i,e., mutual consent by all concerned to the proposed use of the channels), a usage of this complexity can probably be accomplished. Absent such consent, the interference and other issues raised by cellular type two-way operations would be virtually insurmountable. In short, therefore, the Commission should expedite operating authority where a regional master plan has been adopted by all affected licensees, permitting highly flexible two-way usage within

the region with a minimum of regulatory oversight. Where such agreement does not exist, the Commission must remain as vigilant as ever that the earnest desire of some licensees (or non-licensees, for that matter) for two-way operations does not create interference to licensees who wish to retain independent two-way systems or who prefer to serve more traditional wide-area analog video needs.

5. The new rules should recognize that most of the existing carrier-customer agreements were entered into in a non-digital, non-two-way environment. To avoid massive disruption of these existing relationships, the Commission should provide some guidance as to what constitutes a "channel" in this new, highly fluid environment. More fundamentally, the Commission should make it clear that MDS licensees should not be forced against their will to go to a two-way operating mode under the aegis of lease agreements which contemplated no such operation.

It is with these principles in mind that MDS LICENSEES will address some of the specifics of the proposal as it now stands.

A. The Master Plan Concept

While there are numerous problems foreseeable in implementing the two-way proposal as it is presently formulated

(some of these will be addressed below), virtually all of these problems disappear in the context of mutual agreement. In MDS LICENSEES' view, the difficulties posed by numerous cellular booster stations and thousands of response stations operating in close conjunction with other licensed facilities in the same or adjacent markets on the same or adjacent frequencies simply cannot be overcome in the absence of agreement among the affected licensees. As CTN noted in its November 25 submission, the possibilities of interference are horrendous, and even the task of assessing the possibility of interference by all adjacent operators is forbiddingly huge and time-consuming. Any regulatory scheme which preserves the rights of existing licensees to interference-free operation (an end to which the Two-way Proponents theoretically subscribe) would have to provide for the pre-exchange of detailed interference studies, time for the affected party to review the data, and Commission resolution of any resulting disputes. In the context of two-way operation envisioned by Two-way Proponents and MDS LICENSEES, this would substantially undermine the ability of any operator to provide service to its prospective customers on any sort of certain and timely basis, and would thus wholly defeat the purpose of the proposed rules changes. Electromagnetic chaos would result as licensees filed conflicting complaints against each other, either preventing service from beginning at all or causing interference to each other's customers. Again, this is a result of the historical patchwork which we are presented with, a patchwork of different services, licensees,

frequencies and interference protection schemes. If we had a tabula rasa to start with, the possibilities of two-way operations (as with DEMS, for example) would be considerably simplified. But this is not the world as it exists today. The Commission cannot and should not simply sweep away the vested rights and the existing services and operations of existing licensees just because a few operators now perceive the possibility of greater profit for themselves if they are allowed to use the subject frequencies without worrying about interference to other licensed users.

The only way two-way operation can realistically proceed under the constraints imposed by the historical accident of a highly balkanized frequency band is by the consent of all concerned. The Commission should take affirmative steps to foster this atmosphere of mutual consent by permitting the filing of Master Plans. Under the Master Plan concept, a group of licensees in a given BTA or cluster of BTAs could develop a plan for use of the available spectrum. If the participants included all available channels in the market, this would mean that the BTA holder, the ITFS licensees, and the MDS licensees would all reach agreement on a plan that would meet the obligations of the ITFS operators to provide educational material while also permitting MDS and ITFS channels to be used flexibly within the defined BTA.

The Master Plan would need to address, at a minimum, the following particulars:

1. How the minimum provision of educational material to students as required by the current rules would be accomplished. As long as the same amount of programming is available to students under the Master Plan as would be available under the current scheme, the Commission should not care which particular channel the educational material is provided over.[2]/ Thus, the required educational programming could be delivered over any channel or channel group participating in the plan.

2. How interference at the fringes of the defined territory and at the fringes of the participating channels will be handled. We envision that the participants in the plan would either reach interference avoidance agreements with adjacent operators or design their system so that no potentially interfering signals are radiated out of the defined territory. This is the cellular model - cells on the outskirts of the cellular service area must either protect the adjacent operator absolutely or be specifically consented to, while cells and frequencies in the interior of the service area can be used with almost complete flexibility since the carrier only has to coordinate with itself.

3. How licensing of the system would be handled at the

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[2]/ In this connection, the Commission should make explicit that the provision of internet access to schools qualifies as an educational use of ITFS channels. Many schools are now using the internet as an important educational resource, and the high speed access to the internet which could be provided by a two-way operator might well be more educationally useful - and cost effective - than traditional video-based course material.

expiration of the Master Plan upon the withdrawal of participating entities. One of the difficulties posed by "flexible" use of frequencies licensed to different entities is that it becomes impossible to untangle a group of channels from the integrated operating system once the system has become operational. Indeed, it would be a licensing nightmare for the Commission to have to disentangle frequencies from each other once response channels and booster stations had been built, licensed and operated under the scheme proposed by Two-way Proponents. Under a Master Plan, all parties to the Plan would agree in advance how this situation would be handled (e. g., by a mandatory buy-out of the withdrawing party, by allocating that party a specified frequency, in some other way that did not undermine the Plan, or by a complete dissolution of the Plan). In any case, the disentanglement process would not be the Commission's headache but would have been worked out in advance by the parties.

4. How control over the facilities would be maintained and who the contact person is for technical problems. In this scenario, the participants in the plan would likely delegate to a single manager or operator the function for administering the system, and this delegation - subject to their oversight - would be deemed to constitute effective licensee control. It would also give the Commission and other operators a unified contact point to resolve technical problems that might arise.

A Master Plan of this kind could also be adopted by a subset of the available licensees in a given market so that there could potentially be two or more competing providers of two-way service in a market. All participating licensees would, of course, have to acknowledge in writing their consent to participate.

Once a Master Plan was presented to the Commission and approved, the participating licensees would have blanket authority to institute two-way operation anywhere within the defined region. Booster stations would be licensed by a single Form 304A filing for each site under the Master Plan to permit operation by all participating licensees. Thus, all of the participating licensees would be authorized to use their particular frequencies at all of the locations. Each licensee would remain the sole licensee of its "own" frequencies but since each licensee would be authorized at all locations (subject to the terms of the overall Master Plan), flexible use of the frequencies would be maximized. This proposal resolves one of the real problems posed by the scheme envisioned in the NPRM: who would be the licensee of individual booster stations operating at particular locations on particular frequencies? Low power response stations (i.e., customer locations) would be authorized to operate in conjunction with the participating licensees without any individual application or authorization. Within the Master Plan area, all system modifications consistent with the Plan (i.e., internal additions or changes not affecting parties who have not consented to the Plan) would be deemed "minor"

for purposes of public notices, petitions to deny, etc. The Commission would continue to deal with interference issues relative to non-participants in the Master Plan, but these kinds of disputes would presumably be minimized.

Under this scenario, MDS LICENSEES believe that the two-way proposal can work: participating licensees would have pre-resolved all interference issues with themselves and their neighbors, licensing would be significantly simplified, review by the Commission of the details of day to day operations would be minimized, responsiveness to consumer needs would be maximized, and the prerogatives of the participating licensees would be preserved. By the same token, no one would have to participate in the flexible use plan if he did not desire, but the participating entities could work around the non-participant by developing a coordinated frequency use plan which would not create any interference. Thus, the rights and interests of both those licensees who wish to go to two-way operations and those who do not would be preserved.

B. Refarming of Channel 1 and 2/2A

It is unclear from the Commission's December 5, 1997 Public Notice whether CTN is suggesting that MDS channels 1 and 2/2A should be mandatorily reallocated to become response channels or whether that is optional. In any case, MDS LICENSEES strongly object to any plan which would compel licensees of these channels

to be stripped of the full use of their frequencies. Many channel 1 and 2/2A licensees have spent over a decade pouring funds into their stations in an attempt to create value when video programming was the only feasible option. In the last couple of years, with the issuance of the digital declaratory ruling and the explosion of internet use, channel 1 and 2/2A licensees can now make extremely efficient, remunerative and cost effective use of their spectrum. It would be a gross disservice to those licensees to rob them of the fruits of so many long years of labor by reallocating those channels just at the very moment in history when the potential of the channels can be realized.

There has certainly been no showing on this record that the use to which these channels could be put in a two-way environment is so overwhelmingly superior to the current uses that the licensees should be stripped of their licenses against their will simply to provide auxiliary support for someone else's two-way system.

C. Booster Stations Should Only Be Licensed to Existing Licensees

Proposed rule Section 21.913 would permit "booster" stations to be licensed to entities who are not existing licensees of the signals to be "boosted". Persons eligible to file for booster stations under the proposed rule include not only licensees but also "third parties with a fully-executed lease". Under the

proposal, therefore, booster stations within a licensee's protected service area and operating on the same frequency as the primary station could be licensed to and under the control of different persons than the primary station This proposal is absolutely extraordinary.

In no other service does the Commission permit different licensees to operate on the same frequency in the same area at the same time. Simply to state the proposition is to demonstrate how flawed it is. Booster stations within the protected service area of a licensee are normally licensed only to the licensee of the primary station. See, for example, Section 74.1232(f) of the Commission's rules. ("An FM broadcast booster station will be authorized only to the licensee or permittee of the FM radio broadcast station whose signals the booster station will retransmit, to serve areas within the protected contour of the primary carrier." Emph. added) The very integrity of any radio licensing process - and the most fundamental obligation of the FCC - is to be sure that different people are not authorized to use the same frequency simultaneously. Yet that is exactly what this proposal does. While the rule seems to contemplate that consent of the underlying licensee would be obtained, this is not at all the case. The underlying licensees in virtually all instances will have existing lease agreements with programmers or other customers. Under the proposed rule, this innocent arrangement, which in no way contemplated anything but the temporary use of the licensee's

channels, would suddenly be turned into an irrevocable abdication by the licensee of its rights to use and develop the spectrum in its own service area.

This very real possibility would occur in the following scenario. An MDS licensee with a Protected Service Area or a BTA may not be providing service in a portion of its service area due to terrain blockage or other reasons. Assuming that, for whatever reason, a low power "booster" station could be dropped in to that unserved area without interfering with the main station, the lessee of the transmitting capacity of the main station would now be eligible in its own right to file an application for its own license in that area. This is a gross derogation of the rights of the existing license holders since it effectively permits newcomers, on the strength of a lease document that intended no such consequence, to be able to carve out and nibble away at the licensee's territory. What is worse, once the booster application is granted, that licensee would then have interference protection rights against the preexisting licensee, effectively hamstringing that licensee's ability to provide service to that area or adjacent areas.

This is especially inequitable for BTA winners who bid and obligated themselves to pay large sums of money based on the Commission's representation that they would be getting the rights to develop the area over a five to ten year period. Under this new

proposal, all turf in a BTA is potentially up for grabs immediately if the licensee is not serving it at that moment. If practiced by a late night TV pitchman, this kind of "bait and switch" scam might warrant investigation by the FTC. Simply stated, no licensee could have anticipated that by entering into a pure lease agreement with a customer the licensee would later be deemed, ex post facto to have given away the rights to its territory.

Similar considerations to the above apply to the proposal to permit "lessees" of response station hubs to operate these stations. See proposed rule 21.909. It is not entirely clear from the text of the rule whether the Commission intends non-licensees to be eligible to apply for response station hub authorizations, but this appears to be the case given the language in proposed rule 21.909(h). That language indicates that incumbent licensees will lose their interference protection against the hub station licensees within their own territories. As with booster stations authorized within an existing territory, this proposal would create chaotic conditions of multiple licensees on the same frequencies in the same areas.

The stripping away of licensed service area from one licensee and handing it over to a third party applicant for free would upset the entire licensing scheme established by the Report

and Order which provided for auctions of MDS BTAs.[3]/ That plan specified that licenses for BTAs would be auctioned off, subject to the rights of pre-existing incumbents and other pre-auction rules. Bidders were entitled to, and did, rely on the Commission's description of what was being auctioned. Nowhere in the pre-auction parameters did the Commission indicate that portions of the BTA which were not "filled in" at any given time could be seized by a lessee of any licensee in the market. Having already given the spectrum to bidders through the competitive bidding process, the Commission may not unilaterally carve out a portion of its award and give it to another entity.

The idea of permitting third parties to drop licenses into the middle of existing protected service areas is bad from virtually every standpoint. The proponents of the idea are obviously third party lease holders who chose not to obtain licenses either in the auction or years ago; now they have asked the Commission through some sleight of hand to simply hand over portions of the licenses to them for free. This is the kind of overreaching by the Two-way Proponents that necessitated this filing. There are other instances as well. The bottom line on this issue is that only licensees should be permitted to file for or obtain booster or hub response station authorizations within

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[3]/ In the Matter of Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and the Instructional Television Fixed Service, 10 FCC Rcd. 9569 (1995).

their own protected service areas or BTAs.

D. Nonuse Should Not Result in Forfeiture

Under the plan proposed by the Commission and, indeed, under the Master Plan approach suggested above, there might well be whole channels or groups of channels used for subscriber response stations which would be operated on an unlicensed basis. There are a number of Commission rules which envision the lapsing of conditional licenses if a notice of completion of construction is not filed or the forfeiture of a license if it is not used for a period of a year. The Commission should clarify that when a channel is used as part of a two-way operation, even if on an unlicensed basis, that use constitutes construction and usage of the channels sufficient to satisfy the requirements of Sections 21.303, the build-out requirements of Section 21.930, and any other rules predicated on station use.

E. Protection for Receive Facilities as Well as Transmit Facilities

In the hub-based network envisioned by Two-Way Proponents, it is entirely possible that hub "stations" will not be transmit points at all but rather collection points for data transmitted from individual response stations. The data may be relayed from the hub by fiber optic or other non-RF means to a central processing point. The key consideration here is that in a

two-way system, pure and hybrid receive sites will need protection from interference just as much as transmitting stations. If a receive station is not recognized as a protected point for purposes of interference, it may make it impossible to plan a network founded on the integrity of key receiving facilities.

The Commission has protected pure receive sites in other contexts such as ITFS receive sites and satellite earth stations. Similar treatment here will ensure that necessary hub facilities are able to perform their receive and relay functions without interference.

F. Maintaining Licensee Control

MDS LICENSEES endorse the concept of "super channels" which, if voluntarily assembled by participating licensees, could serve to permit much more efficient use of the MDS/ITFS spectrum. We note only that, in the absence of a Master Plan licensing scheme of the type sketched out in Paragraph A above, licensees will have virtually no control over the use of their spectrum. They will not know from moment to moment whether or how their channels are being used, and the Commission would not be able to tell whether a particular offending transmission was from one licensee's station or another's since the use of the spectrum would fluctuate from second to second.

The regulatory scheme established by Congress and implemented by the FCC is founded upon licensee responsibility. **Licensees** are granted authorizations; **licensees** must maintain control over their station operations; **licensees** are charged with responsibility for any regulatory deficiencies at their stations; **licensees** are evaluated at renewal time. All of this makes sense because it is the only way a regulatory agency can focus responsibility on a particular person or company. MDS LICENSEES merely suggest that if a licensing scheme such as that proposed above is not adopted, the Commission will have to provide practical guidelines as to how an MDS or ITFS licensee can meet its statutory and regulatory responsibilities in this unique environment where multiple separately licensed entities meld their channels together in a single merged operation. For this reason, any frequency swapping which takes place as a result of the creation of super channels should be handled by formal assignments of licenses, not by some informal arrangement which would leave confusion as to ownership of the license at the end of the shared use period.

G. Application Processing Issues

In general, it appears that the Commission and the Two-way Proponents were attempting to devise a filing process which reduces unnecessary burdens on the Commission, applicants and other interested parties. MDS LICENSEES fully agree with this principle, but it appears that in some important respects the proposals

streamline the review process so much that meaningful and needed review by both affected parties and the Commission will be impossible. There are a number of practical difficulties with some of the procedures set forth in the NPRM.

1. As set forth in greater detail above, the concept of having non-licensee third parties file separate applications on their own within the protected service areas or BTAs of existing licensees is gross derogation of the rights of the licensees and seriously undermines the integrity of the entire regulatory scheme. Intrasystem licensing should be restricted only to licensees holding rights to the channels used.

2. MDS LICENSEES believe that several of the Two-way Proponents' proposals are impractical and counterproductive. In the context of a Master Plan as outlined above, much of the review of individual booster and response hub station applications could be wholly eliminated - both by the Commission and parties who might otherwise have been potentially affected. In the absence of such a plan, however, the need to maintain vigilant oversight of potential interference is just as strong, if not stronger, than under the current regime for MDS and ITFS. There will continue to be non-participating MDS and ITFS licensees who may be using their facilities for analog video or other purposes and who may be very seriously adversely affected by an improvident two-way proposal. By proposing abbreviated filing windows, short periods to review